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Supreme Court, U.S.
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No. 94-694

In the Supreme Court of the United States

OCTOBER TERM, 1994

ROBERT B. BURKE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court violated petitioner's constitutional rights when it refused to admit into evidence the prior statements of one of petitioner's co-conspirators who testified as a government witness.

2. Whether the district court erred by refusing to instruct the jury that evidence of petitioner's good character was, standing alone, enough to create a reasonable doubt about his guilt.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	1
Argument	5
Conclusion	13

TABLE OF AUTHORITIES

Cases:

BankAtlantic v. *Blythe Eastman Paine Webber, Inc.*, 955 F.2d 1467 (11th Cir. 1992), cert. denied, 113 S. Ct. 966 (1993)	9
Chambers v. *Mississippi*, 410 U.S. 284 (1973)	4, 5, 6, 7
Cool v. *United States*, 409 U.S. 100 (1972)	12
Davis v. *Alaska*, 415 U.S. 308 (1974)	7
Edgington v. *United States*, 164 U.S. 361 (1896)	11, 12
Gordon v. *United States*, 344 U.S. 414 (1953)	5, 7, 8
Kentucky v. *Whorton*, 441 U.S. 786 (1979)	12
Michelson v. *United States*, 335 U.S. 469 (1948)	11
Spangler v. *United States*, 487 U.S. 1224 (1988)	11
United States v. *Burke*, 781 F.2d 1234 (7th Cir. 1985)	12
United States v. *Daily*, 112 S. Ct. 405 (1991)	11
United States v. *Dennis*, 625 F.2d 782 (8th Cir. 1980)	9
United States v. *Devine*, 934 F.2d 1325 (5th Cir.), cert. denied, 112 S. Ct. 349 (1991)	9
United States v. *Lashmett*, 965 F.2d 179 (7th Cir. 1992)	9
United States v. *Soundingsides*, 825 F.2d 1468 (10th Cir. 1987)	9
United States v. *Spangler*, 838 F.2d 85 (3d Cir.), cert. denied, 487 U.S. 1224 (1988)	5
Washington v. *Texas*, 388 U.S. 14 (1967)	7

Constitution, statutes and rules:	Page
U.S. Const. Amend. VI	7
Jencks Act, 18 U.S.C. 3500	8
18 U.S.C. 371	2
18 U.S.C. 844(i)	2
18 U.S.C. 1512(a)(1)(A)	2
18 U.S.C. 1958(a)	2
18 U.S.C. 1962(c)	2
Fed. R. Evid.:	
Rule 801(d)(2)(E)	3, 4, 10
Rule 803(2)	5

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A12) is unpublished, but the decision is noted at 31 F.3d 1174 (Table).

JURISDICTION

The judgment of the court of appeals was entered on July 20, 1994. Pet. App. D1-D2. The petition for a writ of certiorari was filed on October 18, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioner was convicted of murdering a federal witness, in violation of

18 U.S.C. 1512(a)(1)(A); conspiring to do so, in violation of 18 U.S.C. 371; conducting the affairs of an enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. 1962(c); committing arson, in violation of 18 U.S.C. 844(i); and using interstate commerce facilities to commit a murder for hire, in violation of 18 U.S.C. 1958(a). He was sentenced to life imprisonment and fined $25,000. The court of appeals affirmed. Pet. App. A1-A12.

1. Petitioner was a lawyer who had a former client murdered to prevent her from testifying before a grand jury about his scheme for defrauding insurance companies. In 1987, petitioner and two physicians developed the scheme, under which petitioner submitted false medical bills to insurance companies for treatment that supposedly had been given to petitioner's personal-injury clients. The scheme became the subject of a federal criminal investigation in the late 1980s. The investigation led to the return of a 106-count indictment charging petitioner with money laundering, making false declarations to a grand jury, mail fraud, and obstruction of justice. In 1990, petitioner pleaded guilty to those charges and was sentenced to five years' imprisonment. See Pet. App. A2 & n.2.

Earlier, in May 1989, after learning of the grand jury investigation, petitioner coached his former clients to commit perjury before the grand jury. Donna Willard was the one former client who, on March 1, 1990, told petitioner that she would not lie to the grand jury. Petitioner told Willard that if she did not do so he would put "two bullets in her head." Pet. App. A3. On March 6, 1990, Willard died after she was shot twice in the head at point-blank range in her home while her 12-year old son was watching. *Ibid.*; Gov't C.A. Br. 11-13.

2. James Louie pleaded guilty to the murder of Willard and later testified at petitioner's trial, as follows.

Petitioner told Louie that Willard had refused to lie to the grand jury and that he wanted Louie to find someone to murder her. Petitioner gave Louie money to pay the gunman and bullets for the gun. Petitioner emphasized that Willard had to be killed before she was to appear before the grand jury. Louie found the man who would actually pull the trigger, Javier Lebron, through a third man, John Foley. On the night of the murder, Louie and Foley drove Lebron to Willard's home, gave Lebron $1,000 of the money that petitioner had provided, and drove Lebron back to New Jersey after Lebron shot Willard. Pet. App. A3; Gov't C.A. Br. 6, 13-15.

On both direct and cross-examination, Louie said that he concealed petitioner's involvement in the murder from Foley and Lebron. Pet. App. A4; Gov't C.A. Br. 6-7. In his own defense, petitioner sought to introduce two tape-recorded conversations between Foley and Louie in which Louie said that petitioner was not involved in the murder plot. Petitioner argued that the tapes fell within the co-conspirator exception to the hearsay rule in Fed. R. Evid. 801(d)(2)(E) and were also admissible as prior inconsistent statements to impeach Louie. The district court refused to admit the recorded statements. Pet. App. A4.

The court also declined petitioner's request to instruct the jury that evidence of his good character was, standing alone, enough to create a reasonable doubt about his guilt. The court instead charged the jury that "[a]long with all the other evidence that you have heard, you may take into consideration what you believe about the defendant's peacefulness and nonviolence when you decide whether the government has proved beyond a reasonable doubt that the defendant committed the crime." Pet. App. A11-A12.

3. The court of appeals affirmed petitioner's convictions. Pet. App. A1-A12. It rejected petitioner's contention that Louie's prior statements to Foley were admissible under Rule 801(d)(2)(E).[1] The court explained: "The plain meaning of th[e] language [of the Rule] is that 'a statement by a coconspirator of a party during the course and in furtherance of the conspiracy' is admissible against *that* party. Here, Louie was not a co-conspirator of the United States, and therefore his statements could not be offered against the United States in this case." Pet. App. A4-A5.

The court also held that the admission of Louie's prior statements was not required by the Constitution. Pet. App. A5-A7. It distinguished *Chambers* v. *Mississippi*, 410 U.S. 284 (1973), where this Court held that a state evidentiary rule had deprived Chambers of his due process rights by excluding evidence favorable to him. The court of appeals determined in this case that, unlike the prior statements against penal interest at issue in *Chambers*, Louie's prior statements did not bear "persuasive assurances of trustworthiness," and that, in contrast to the defendant in *Chambers*, petitioner had an unrestricted opportunity to cross-examine the witness who had made the prior statements. Pet. App. A6-A7 (internal quotation marks omitted). The court further held that, even if Louie's prior statements should have been admitted, their exclusion was harmless error. *Id.* at A9.

The court of appeals rejected petitioner's challenge to the jury instruction on character evidence, observing

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[1] Rule 801(d)(2)(E) provides that "[a] statement is not hearsay if * * * [t]he statement is offered against a party and is * * * a statement by a coconspirator of a party during the course and in furtherance of the conspiracy."

that the same instruction had been approved in *United States* v. *Spangler*, 838 F.2d 85, 86-87 (3d Cir.), cert. denied, 487 U.S. 1224 (1988). Pet. App. A12.[2]

ARGUMENT

1. Petitioner contends that he was deprived of due process and the equal protection of the laws by the district court's refusal to admit the prior statements that Louie made to Foley denying petitioner's involvement in the plot to murder Willard. That contention is without merit.

a. Petitioner first argues that the exclusion of Louie's statements deprived him of due process under this Court's decisions in *Chambers* v. *Mississippi*, 410 U.S. 284 (1973), and *Gordon* v. *United States*, 344 U.S. 414 (1953). Pet. 10-25. The court of appeals correctly rejected that argument. Pet. App. A6-A8.

In *Chambers*, a defendant on trial for murder called as a witness McDonald, who had previously confessed to the murder. On direct examination of McDonald, the defendant introduced McDonald's written confession. On cross-examination by the prosecutor, however, McDonald repudiated the confession and gave an alibi for the time of the murder. The trial court refused to allow the defendant to cross-examine McDonald as an adverse witness or to introduce into evidence prior oral state-

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[2] The court of appeals also held that, under the "excited utterance" exception to the hearsay rule, Fed. R. Evid. 803(2), the district court properly admitted the testimony of Willard's coworker that Willard said petitioner threatened to put "two bullets in her head" if she did not lie to the grand jury. Pet. App. A10-A11. Although the petition contains argument concerning that holding (Pet. 27-28), the correctness of that holding is not encompassed within the questions presented (Pet. i) and, in any event, the holding does not warrant further review.

ments by McDonald confessing to the murder. See *Chambers*, 410 U.S. at 291-293.

This Court reversed the defendant's conviction, holding that he did not receive a fair trial. 410 U.S. at 302. The Court began by observing that two "essential" elements of a fair trial are "[t]he rights to confront and cross-examine witnesses and to call witnesses in one's own behalf." *Id.* at 294. The Court determined that "[b]oth of these elements * * * [were] implicated" in that case. *Id.* at 295. First, the defendant "was denied an opportunity to subject McDonald's damning repudiation and alibi to cross-examination." *Ibid.* But the Court found it unnecessary to "decide * * * whether this error alone would occasion reversal," in light of "the ultimate impact of that error when viewed in conjunction with the trial court's refusal to permit [the defendant] to call other witnesses" to testify to McDonald's prior statements confessing to the murder. *Id.* at 298. The Court emphasized that the prior statements "bore persuasive assurances of trustworthiness." *Id.* at 302.[3] The Court concluded that "the exclusion [of the prior statements] * * * coupled with the State's refusal to permit [the defendant] to cross-examine McDonald," deprived him of due process. *Ibid.*

The court of appeals correctly concluded in the present case that the exclusion of Louie's prior statements did not conflict with *Chambers*. See Pet. App. A5-

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[3] The Court explained (*Chambers*, 410 U.S. at 300-301):

> First, each of McDonald's confessions was made spontaneously to a close acquaintance shortly after the murder had occurred. Second, each one was corroborated by some other evidence in the case. * * * Third, * * * each confession here was in a very real sense self-incriminatory and unquestionably against interest.

A7. First, unlike the statements against penal interest in *Chambers*, Louie's prior statements to Foley did not bear "persuasive assurances of trustworthiness." 410 U.S. at 302; Pet. App. A7. Louie's prior statements were not corroborated by other evidence at trial, and they were not incriminatory of Louie or otherwise against his interest. See Pet. App. A3-A4. Furthermore, the court of appeals determined that petitioner's opportunity to cross-examine Louie was not restricted "in any comparable way" to that of the defendant in *Chambers*. *Id.* at A7.[4] Thus, petitioner's trial lacked the combination of errors that together led to reversal in *Chambers*.

In *Gordon* v. *United States*, 344 U.S. 414 (1953), the government failed to produce before trial the prior inconsistent statements of a witness named Marshall. On cross-examination, Marshall admitted that between his arrest and his final statement to the police, which implicated defendants in the crime (theft of film), he had given three or four written statements that did not implicate them. *Id.* at 416. The trial court refused to order the production of those statements at trial. *Ibid.* In addition, it refused to allow the defendant during cross-examination of Marshall to elicit the fact that, before Marshall made his final statement to the police inculpating defendants, he had pleaded guilty to

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[4] Because petitioner's cross-examination of Louie was not restricted in any significant way, petitioner's Sixth Amendment argument is without merit. See Pet. 23 n.28, 24, citing *Davis* v. *Alaska*, 415 U.S. 308, 315-318 (1974) (Sixth Amendment violated when trial court, relying on state statute, refused to allow defendant to use juvenile probation status to show bias of government witness), and *Washington* v. *Texas*, 388 U.S. 14, 19-23 (1967) (Sixth Amendment violated by state rule disqualifying alleged accomplices from testifying for criminal defendants).

possession of the stolen film and been admonished by the judge who accepted that plea to tell the probation authorities, before sentencing, everything he knew about the offense, "even though it might involve others." *Id.* at 416-417.

This Court held that the trial court erred in refusing to order the production of Marshall's prior inconsistent statements, *Gordon*, 344 U.S. at 418-419[5]; that it erred in restricting the defendant's cross-examination of Marshall so as to exclude the judge's admonition, *id.* at 421-422; and that "the combination of these two errors was sufficiently prejudicial to require reversal," *id.* at 422. The Court further held that each prior written statement was admissible into evidence, "providing it meets all other requirements of admissibility and no valid claim of privilege is raised against it." *Id.* at 420-421.

Gordon does not support petitioner's constitutional argument, because *Gordon* was not based on the Constitution. Instead, the Court in *Gordon* applied "principles of common law" concerning the admissibility of evidence, 344 U.S. at 418, to conclude that the trial court erred by excluding certain documents, and that the error "prejudiced substantial rights," *id.* at 423. See *Gordon*, 344 U.S. at 418 (case before the Court involved "a limited and definite category of documents to which the holdings of this opinion are likewise confined").

In any event, *Gordon* is distinguishable. Unlike Marshall's prior written statements in *Gordon*, which the Court held were admissible under common law

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[5] Because *Gordon* was decided before enactment of the Jencks Act, 18 U.S.C. 3500, and the Federal Rules of Evidence, the Court relied on "principles of the common law" in holding that the prior written statements should have been produced and admitted into evidence at trial. 344 U.S. at 418.

principles of evidence, Louie's prior statements were not admissible under the subsequently adopted Federal Rules of Evidence (see note 5, *supra*), because they were hearsay that fell outside the co-conspirator exception to the hearsay rule, as both courts below concluded. See Pet. App. A4-A5. In further contrast to Marshall's prior statements, Louie's prior statements were not corroborated by Louie's testimony at trial, but were contradicted by Louie's testimony that those prior statements were false and were made to protect petitioner. *Id.* at A4, A2-A8 & n.3. And petitioner, unlike Gordon, had a full and fair opportunity to cross-examine Louie on his prior statements and his reasons for making them. *Gordon* is therefore of no assistance to him.[6]

b. Petitioner next argues that the exclusion of Louie's prior statements violated equal protection, because it is unfair to allow co-conspirator statements to be admitted against criminal defendants but not against

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[6] The court of appeals in this case did not purport to apply a categorical rule barring "extrinsic evidence" to impeach a witness where the witness admits making a prior statement. See Pet. App. A7-A8. Petitioner is therefore mistaken in contending (Pet. 14) that the decision below "exacerbate[s]" an asserted conflict on that issue. See Pet. 14-17 & n.15. The decision below, however, is consistent with the decisions of other courts of appeals holding that extrinsic proof of a prior inconsistent statement generally is admissible only when the witness on cross-examination denies having made the prior statement. *E.g.*, *BankAtlantic* v. *Blythe Eastman Paine Webber, Inc.*, 955 F.2d 1467, 1476 (11th Cir. 1992), cert. denied, 113 S. Ct. 966 (1993); *United States* v. *Devine*, 934 F.2d 1325, 1344-1345 (5th Cir.), cert. denied, 112 S. Ct. 349 (1991); *United States* v. *Soundingsides*, 825 F.2d 1468, 1470 (10th Cir. 1987); *United States* v. *Dennis*, 625 F.2d 782, 796 (8th Cir. 1980); but cf. *United States* v. *Lashmett*, 965 F.2d 179, 182 (7th Cir. 1992) (exclusion of extrinsic evidence was harmless error).

the government. As the court of appeals determined, however, petitioner's equal protection argument "is inapplicable in this case." Pet. App. A7. Louie's prior statements were inadmissible hearsay not because they were offered against the government, but because they were not the statements of a co-conspirator of the party against which they were offered (in this case, the government), as required by Fed. R. Evid. 801(d)(2)(E). See Pet. App. A4-A5 ("Here, Louie was not a co-conspirator of the United States, and therefore his statements could not be offered against the United States in this case."). Thus, this case does not present the question whether the statement of a witness who has conspired with the government could be admitted against the government if it meets the other requirements of Rule 801(d)(2)(E) and, if not, whether that result would offend equal protection principles.[7]

c. In any event, the court of appeals correctly held that, even if it was error to exclude Louie's statements, the error was harmless. Pet. App. A8-A9. As the court of appeals observed, "[d]uring his direct testimony and on cross-examination, Louie admitted numerous times that he had lied to Foley regarding [petitioner's] involvement." *Ibid.* The court of appeals' own examination of the record "convince[d] [it] that Louie was effectively impeached with this evidence." *Id.* at A9. In light of that case-specific determination, the exclusion of Louie's prior statements does not warrant further review.

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[7] The Third Circuit recognized that this question was not before it when it stated: "If Louie had been a coconspirator or agent of the government when he made the statements in question, [petitioner's equal protection] argument would be more apposite. But since Louie held no such status, [petitioner's] argument is misplaced." Pet. App. A7.

2. Petitioner renews his contention that he was entitled to a jury instruction stating that evidence of his good character was, standing alone, enough to create a reasonable doubt precluding conviction. Pet. 25-29. There is some disagreement among the circuits over whether such an instruction is ever required by due process. See *Spangler* v. *United States*, 487 U.S. 1224 (1988) (White, J., dissenting from denial of certiorari). Nonetheless, this Court has declined further review of the issue in two prior cases, *United States* v. *Daily*, 112 S. Ct. 405 (1991); *Spangler* v. *United States*, *supra*, and there is no reason for a different course here. The court of appeals in the present case merely adhered to its prior decision in *Spangler*. See Pet. App. A12. Thus, contrary to petitioner's assertion, the decision below does not "exacerbate[]" the disagreement among the circuits. Pet. 26.

This Court has never held that the jury in a criminal case must be specifically instructed that evidence of the defendant's good character may, standing alone, suffice to create a reasonable doubt precluding a finding of guilt. Some lower courts, however, have suggested that such an instruction is required, at least in certain cases, by *Edgington* v. *United States*, 164 U.S. 361 (1896), and *Michelson* v. *United States*, 335 U.S. 469 (1948). See *Spangler* v. *United States*, 487 U.S. 1224 (1988) (White, J., dissenting). In *Edgington*, the Court recognized that evidence of good character may, alone, give rise to a reasonable doubt, but the Court did not hold that the Constitution requires a specific jury instruction to that effect. See 164 U.S. at 365-366. Although the Court did state in *Michelson* that such an instruction might be required "in a proper case," 335 U.S. at 476, "[t]he passage was dictum. The question before the Court [in *Michelson*] was whether the prosecutor may introduce

specific instances of bad conduct in response to the defendant's character evidence." *United States* v. *Burke*, 781 F.2d 1234, 1241 (7th Cir. 1985).

Assuming that in some cases due process requires a jury instruction specifically stating that good character alone is enough to create reasonable doubt, this is not such a case. Cf. *Kentucky* v. *Whorton*, 441 U.S. 786 (1979) (per curiam) (due process does not require jury instruction on presumption of innocence in every case). Petitioner does not and cannot suggest that any of the jury instructions actually given could have led the jury to disregard or undervalue the evidence of petitioner's good character. Cf. *Edgington*, 164 U.S. at 366 (disapproving lower court decisions suggesting that evidence of good character was entitled to less weight than other types of evidence); *Cool* v. *United States*, 409 U.S. 100, 102-104 (1972) (reversing conviction when instruction, in effect, instructed jury to disregard defense testimony unless it "believ[ed] beyond a reasonable doubt that the testimony [was] true"). Indeed, the trial court informed the jury that "[a]long with all the other evidence that you have heard, you may take into consideration what you believe about the defendant's peacefulness and nonviolence when you decide whether the government has proved beyond a reasonable doubt that the defendant committed the crime." Pet. App. A11-A12. That instruction permitted the jury to find petitioner not guilty based solely on evidence of his good character. The trial court's failure to give a more specific instruction did not deprive petitioner of a fair trial.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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